the contract acted merely as the agent of the corporation whose property was in his hands, the lien should attach. The majority, however, expressly repudiated this view, but seemed nevertheless to have considered that he acted as the representative of the debenture-holders at whose instance he was appointed. Although the latter argument seems unsound,[23] yet in view of the fact that the lien was sought to be asserted against the receiver with respect to charges due from the corporation whereas the terms of the contract covered only freight owed by the same shipper, the result reached is undoubtedly correct.

CRIMINAL JUDGMENTS AS *Res Adjudicata* IN CIVIL ACTIONS FOR PENALTIES.—The rule broadly stated that a verdict and judgment in a criminal prosecution cannot be pleaded as a bar to a subsequent civil action[1] finds its most obvious support in the argument based upon the usual diversity of parties in the two actions.[2] Since the doctrine of *res adjudicata* is properly invoked only between parties and their privies,[3] the fact that the State is charged with the conduct of the criminal prosecution whereas the civil controversy is between individuals, ordinarily renders it inapplicable in such cases.[4] Surely the enunciation of a contrary rule would result in a violation of the fundamental maxim[5] that no one shall be concluded by proceedings to which he was a stranger.[6] It is manifest, however, that this objection does not obtain where the State is the plaintiff in the civil as well as the criminal action and it is in precisely such circumstances that it becomes important to determine the exact scope of the principal under consideration.

However forceably it may be contended that to allow a civil judgment to be pleaded in a criminal action, would violate the constitutional rights of a person charged with a crime by virtually compelling him to be a witness against himself,[7] such an argument alone would seem to furnish no valid ground for refusing to consider at least a criminal verdict of conviction as *res adjudicata* in a civil suit. The fact that the available proof would be greater in the civil than in the criminal action, in that the accused might be compelled to testify in the former, would however prevent an acquittal being pleaded as *res adjudicata* in the civil proceeding. Manifestly this argument cannot avail in those jurisdictions where the civil action is so far penal in

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[23]Corporation of Bacup *v.* Smith *supra.*

[1]Chamberlain *v.* Pierson (1898) 87 Fed. 420; Betts *v.* New Hartford (1856) 25 Conn. 180; Summers *v.* Bergner Brewing Co. (1891) 143 Pa. St. 114; Doyle *v.* Gore (1895) 15 Mont. 212; see also People *v.* Kenyon (1892) 93 Mich. 19; State *v.* Bradnack (1897) 69 Conn. 212.

[2]Jones *v.* White (1718) 1 Strange 68; Petrie *v.* Nuttall (1856) 11 Exch. 569; Cottingham *v.* Weeks (1875) 54 Ga. 275.

[3]Cluff *v.* Mutual Benefit Life Ins. Co. (1868) 99 Mass. 317; 10 COLUMBIA LAW REVIEW 156.

[4]Schreiner *v.* High Court of I. C. O. of F. (1889) 35 Ill. App. 576; Wilson *v.* Manhattan Ry. Co. (N. Y. 1895) 2 Misc. 127; Doyle *v.* Gore *supra.*

[5]Corbley *v.* Wilson (1874) 71 Ill. 209.

[6]Hutchison *v.* Merchants' & Mechanics' Bank of Wheeling (1861) 41 Pa. St. 42.

[7]See State *v.* Corron (1905) 73 N. H. 434.

its nature that the defendant cannot be required to testify therein.[8] It is to observed that these considerations concern themselves only with the amount of evidence which, under the constitutional provision above referred to, is available in the two actions and consequently they are not conclusive of the question, which is further complicated by virtue of the rule that in the one the facts must be proved beyond a reasonable doubt whereas in the other a preponderance of evidence is sufficient.[9]

The application of this principle is most perplexing in cases arising under a statute which declares that its violation shall subject the offender to punishment by imprisonment as well as liability for a penalty recoverable in a civil action. In this connection the position taken by the Federal Supreme Court, as evidenced by the decision in *Coffey* v. *United States*,[10] is in apparent conflict with that of the State courts. In that case the court although apparently admitting that the degree of proof was not the same in the two suits, declared nevertheless that since the purpose of both was punishment, a verdict of acquittal in a prior criminal prosecution established conclusively that the facts upon which such punishment could be predicated were non-existent and that consequently such a judgment was a bar to a subsequent action for the penalty. Although this rule commends itself in that it precludes the possibility of inflicting one punishment when the facts would not justify the other, yet in view of the admission that the degree of proof required in the purely criminal prosecution was greater than in the civil action, the reasoning seems insufficient, for a jury might in the absence of proof beyond a reasonable doubt have refused to convict on the prior charge and still have found in the subsequent suit that the facts were established by a preponderance of evidence. Even under the doctrine thus enunciated it is obvious that a distinction must be observed with respect to those cases in which the subsequent action accrues as a mere incident to the doing of the prohibited acts, as a suit to recover timber converted in violation of a punitive statute[11] or a bill in equity to enjoin a nuisance created in the same manner.[12] Indeed wherever an actual wrongful intent is a necessary element of the criminal though not of the civil liability the doctrine is plainly inapplicable.[13]

In a recent case, *People ex rel.* v. *Clement, Commissioner* (1910) 124 N. Y. Supp. 748, the New York Court took occasion to disapprove of the result reached by the United States court declaring that a former acquittal on a criminal prosecution for violation of the liquor law could not be pleaded as *res adjudicata* in a civil action to compel the payment of a rebate upon a surrendered liquor tax certificate conditioned upon non-violation of the law during the year for which it was granted. Although the doctrine of the United States cases is perhaps referable to the fact that the purpose of the Federal statutes in their entirety is more clearly that of punishment than that of the State

[8]Lees *v.* United States (1893) 150 U. S. 476; Boyd *v.* United States (1886) 116 U. S. 616.

[9]People *v.* Leland (N. Y. 1893) 73 Hun. 162; People *v.* Snyder (N. Y. 1904) 90 App. Div. 422; Britton *v.* State (1884) 77 Ala. 202.

[10]Coffey *v.* United States (1885) 116 U. S. 436.

[11]Stone *v.* United States (1897) 167 U. S. 178.

[12]United States *v.* Donaldson-Schultz Co. (1906) 148 Fed. 581.

[13]United States *v.* Jaedicke (1896) 73 Fed. 100; United States *v.* Schneider (1888) 35 Fed. 107.

statutes, yet in view of the reasoning adopted in its support, it seems that the criticism was well directed. Since the purpose of the statute involved, as interpreted by the New York Courts, was indemnity,[14] the case clearly falls without the scope of the doctrine of the *Coffey Case* which has been limited strictly to actions whose purpose is clearly that of punishment.

DETERMINATION OF PERIOD TO WHICH WORDS OF SURVIVORSHIP REFER.—Whenever words of survivorship are contained in a devise creating a tenancy in common, the supposed incompatibility between such a tenancy and an indefinite survivorship early caused the courts to demand that some period be fixed to which these words can be limited. If the gift be immediate it is presumable that the testator intended to provide against the death of the objects of his bounty during his own lifetime, and survivorship, consequently, is properly applicable to the date of his decease.[1] Where, however, an intermediate estate is created there is obviously a second period to which these words can be referred, and in dealing with such gifts, many courts, following the rule enunciated above, and influenced moreover by the conception that inconsistency cannot otherwise be avoided, have held that even in these cases the survivors must be ascertained at the death of the testator.[2] The arguments offered in support of this view concern themselves more with the established tendencies of the courts in the construction of wills than with an attempt to discover the true import of the expressions used. Thus, it is said that the desirability of precluding the possibility of a total intestacy, which might result from the death of all the remaindermen during the life of the intermediate tenant, demands such a construction.[3] On the other hand, the unusual favor with which the law looks upon a vested as distinguished from a contingent interest is supposed to afford an even stronger justification for this view;[4] though surely the force of this latter argument is somewhat impaired by the present inability of a particular tenant to destroy the contingent remainder by means of fine or recovery. As a result of such considerations, the doctrine that survivorship is referable to the death of the testator seems to have been applied, especially in the earlier decisions, almost with the force of a rule of law. In spite of this, the courts were not loath to recognize the potency of special circumstances indicating a contrary intent, such as the non-existence of the designated subject matter of the gift until the time of distribution,[5] or the presence of other bequests specifically referred to the same period.[6] In the decision

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[14]See People *v.* Briggs (1889) 114 N. Y. 56; People *v.* Rohrs (N. Y. 1888) 49 Hun 150; State *v.* Corron *supra.*

[1]But see Morse *v.* Mason (Mass. 1865) 11 Allen 36.

[2]Rose *v.* Hill (1766) 3 Burr. 1881.

[3]Ross *v.* Drake (1860) 37 Pa. St. 373.

[4]Maberly *v.* Strode (1797) 3 Ves. 450; Doe *v.* Prigg (1828) 8 B. & C. 231.

[5]Brograve *v.* Winder (1795) 2 Ves. 634.

[6]Daniell *v.* Daniell (1801) 6 Ves. 297; *cf.* Newton *v.* Ayscough 19 Ves. 534.